



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Herman (Bud) Bernitt, President
Citizens for Truth
1819 Arlington Rd.
Bloomington, IN 47404

OCT 9 2009

RE: MUR 6164
Citizens for Truth

Dear Mr. Bernitt:

On February 3, 2009, the Federal Election Commission notified you of a complaint alleging that Citizens for Truth may have violated certain sections of the Federal Election Campaign Act of 1971, as amended. On September 10, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that Citizens for Truth made excessive contributions in violation of 2 U.S.C. § 441a or failed to report contributions in violation of 2 U.S.C. § 434 based on allegedly coordinated communications, and no reason to believe that Citizens for Truth violated 2 U.S.C. § 433 by failing to register with the Commission. Also on that date, the Commission dismissed the allegation that Citizens for Truth violated 2 U.S.C. § 434(c) by failing to file independent expenditure reports with the Commission, and found no reason to believe that Citizens for Truth violated 2 U.S.C. § 434(d) by failing to file electioneering communication reports with the Commission. Accordingly, the Commission closed its file in this matter on October 1, 2009.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Michael Columbo, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Citizens for Truth

MUR 6164

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Brian L. Wolff, on behalf of the Democratic Congressional Campaign Committee. *See* 2 U.S.C. § 437g(a)(1).

II. INTRODUCTION

The complaint alleges that Citizens for Truth ("CFT") coordinated communications with Mike Sodrel ("Sodrel"), the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer ("FMS"), Sodrel's principal campaign committee for his 2004 and 2006 congressional campaigns in Indiana's 9th Congressional District. The allegedly coordinated communications involved radio ads and billboards advocating for the defeat of Baron Hill, Mike Sodrel's opponent in the 2004 and 2006 general elections. In support of the allegations, the complaint included phone records purportedly showing calls between individuals associated with FMS and CFT. *See* Complaint at Attachment A.

Additionally, the Complaint alleged that CFT failed to disclose the contributions and expenditures associated with the allegedly coordinated communications in violation of 2 U.S.C. § 434. *See* Complaint at 5-6. The complaint also alleges that CFT made more than \$1,000 in expenditures but did not register with the Commission as a political committee, thereby violating 2 U.S.C. § 433. *See* Complaint at 5. Finally, the complaint alleges CFT violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to file independent

1 expenditure or electioneering communication reports with the Commission regarding its election
2 activity in 2004 and 2006. *See* Complaint at 6.

3 A prior matter, MUR 5845 (Citizens for Truth), was generated by a complaint filed by
4 the Indiana Democratic Party that alleged that FMS and CFT coordinated their communications
5 during the 2004 election cycle. In that matter, the Commission found no reason to believe and
6 closed the file because there was insufficient information available to support the allegations,
7 including the fact that the complaint identified no communications. *See* MUR 5845 (Citizens for
8 Truth) Factual and Legal Analysis at 8. In contrast to MUR 5845, the MUR 6164 complaint
9 alleges activity in both the 2004 and 2006 election cycles.

10 Based on the information provided in the complaint and the response to the complaint,
11 and for the same reasons present in MUR 5845, that is, a lack of information that would satisfy
12 the coordinated communications test at 11 C.F.R. § 109.21, the Commission finds no reason to
13 believe that Citizens for Truth violated 2 U.S.C. § 441a through the making of excessive
14 contributions to the Friends of Mike Sodrel. Because the available information does not indicate
15 that CFT and FMS may have coordinated communications, the Commission finds no reason to
16 believe that Citizens for Truth failed to disclose the allegedly coordinated communications as
17 contributions and expenditures in violation of 2 U.S.C. § 434. Additionally, the Commission
18 finds no reason to believe that Citizens for Truth violated 2 U.S.C. § 433 for failing to register
19 with the Commission as a political committee. Finally, given that the only identifiable
20 communication in this matter is a radio ad that was broadcast in October 2004 and the modest
21 potential amount that CFT spent on this ad, the Commission dismisses the allegations that
22 Citizens for Truth violated 2 U.S.C. § 434(c) by failing to file independent expenditure reports

with the Commission and finds no reason to believe that Citizens for Truth violated 2 U.S.C. § 434(f) by failing to file electioneering communication reports with the Commission.

III. FACTUAL SUMMARY

Mike Sodrel and Baron Hill have repeatedly challenged one another in elections for the seat in the House of Representatives representing Indiana's Ninth Congressional District. Complaint at 2. Hill first won election in 1998, successfully defended a challenge from Sodrel in 2002, lost to Sodrel in 2004, regained the seat in 2006, and, most recently, defeated Sodrel's challenge in 2008. *Id.*

CFT is a section 527 organization founded in 2004 by Bud Bernitt, who serves as its President.¹ *Id.* The complaint alleges, on "information and belief," that Bernitt "more or less" exclusively controls CFT and uses it to attack Rep. Hill. *Id.* According to the Complaint, all of CFT's activities have been attacks on Rep. Hill. *Id.* Citing CFT's own statements on the CFT website, the complaint alleges that in 2004 CFT "released hundreds of ads attacking Hill, and sponsored 38 billboards" and in 2006 aired radio advertisements and sponsored billboards attacking Hill in 2006. *Id.* The complaint does not include a transcript of any of the alleged radio ads but instead refers to a "sample ad" on the CFT website. *Id.* The CFT website includes an audio recording and transcript for one radio ad called "Baron the Dodger" that, according to a CFT press release, was broadcast in October 2004. *See* www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm. The complaint alleges that, "on information and belief," CFT spent "more than \$10,000" on radio ads "attacking Hill" in 2004 and 2006. There are no descriptions of the billboards in the complaint. *Id.* The CFT website also has no information about billboards.

¹ Section 527 organizations refer to organizations that file with the Internal Revenue Service under Section 527 of the Internal Revenue Code.

On its website, CFT describes itself as follows:

Citizens for Truth (CFT) is committed to promoting Hoosier family values and educating Hoosiers on issues relating to those values. CFT is a "527" political group dedicated to informing the people of Indiana on the voting records, issue positions, actions and public statements of elected officials and candidates for public office.

<http://www.citizensfortruth.com/aboutus/>.

IV. ANALYSIS

A. Alleged Coordination Between Citizens for Truth and Sodrel or Friends of Mike Sodrel

The complaint asserts that CFT coordinated its communications, radio ads and billboards, with Sodrel or FMA in 2004 and 2006. The Act provides that expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitute in-kind contributions to the candidate's authorized committee. 2 U.S.C. § 441a(a)(7)(B)(i). A payment for a coordinated communication must be reported as an expenditure made by that candidate's authorized committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-kind contribution, the costs of a coordinated communication must not exceed a political committee's applicable contribution limits. See 2 U.S.C. § 441a.

To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a three-pronged test: (1) the communication must be paid for by a person other than a federal candidate, a candidate's authorized committee, or any agent of either of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. See 11 C.F.R. § 109.21(a).

1 1. *Billboards*

2
3 The complaint asserts that CFT coordinated its payment for billboards with Sodrel or
4 FMS in 2004 and 2006. However, the complaint contained no descriptions of the allegedly
5 coordinated billboards but rather merely noted that CFT referred to hillboards on its website. *See*
6 Complaint at 2. We located a press release on the CFT website dated March 27, 2006 that states
7 "Citizens for Truth ran radio advertisements, erected billboards and posted
8 www.WhereIsBaron.com during the 2004 election cycle to educate people about Baron Hill's
9 positions on key issues of concern to Hoosiers." *See*
10 www.citizensfortruth.com/pressreleases/pr032706.shtml. A press release dated October 23,
11 2004, on the CFT website states that WhereIsBaron.com "released 38 new billboards and a
12 website to help Hoosier voters learn more about the elusive Congressman's liberal voting
13 record" and that the "issues-based WhereIsBaron.com billboard campaign begins today in
14 counties throughout Southern Indiana." *See* [www.citizensfortruth.com/whereisbaron/PR-38-](http://www.citizensfortruth.com/whereisbaron/PR-38-billboards.htm)
15 [billboards.htm](http://www.citizensfortruth.com/whereisbaron/PR-38-billboards.htm). CFT acknowledged making a "small billboard buy" in 2004, *see* CFT Response
16 at 2-4, and in its 2004 filings with the Internal Revenue Service, CFT disclosed spending \$6780
17 on October 21, 2004 for "Billboard Sales." *See* CFT IRS Form 8872 (dated December 1, 2004).

18 Billboards are public communications. *See* 2 U.S.C. § 431(22). Because CFT's October
19 2004 billboards concerned Rep. Hill's voting record, they presumably identified Rep. Hill. Even
20 assuming, *arguendo*, that the billboards were public communications that clearly identified a
21 federal candidate in the candidate's jurisdiction, and otherwise satisfied at least one of the
22 content standards in 11 C.F.R. § 109.21(c), the coordinating conduct alleged in the complaint
23 took place in 2006 and there is no information about alleged coordinating conduct in 2004. CFT
24 also reported to the Internal Revenue Service that it paid a media consultant \$5,915 on

October 10, 2006, and \$2,630 on October 17, 2006, for "billboards." See CFT IRS Form 8872 (dated December 5, 2006). However, there is no available information concerning the content of CFT's 2006 billboards.

Based on the available information, the allegations with respect to CFT's 2004 and 2006 billboard buys are not sufficient to warrant an investigation into whether the conduct and content standards, see 11 C.F.R. § 109.21(c) and (d), of the coordinated communications test have been met.

2. Radio Ads

The complaint included no radio ad transcripts or dates of their broadcast. It referred only to a "sample ad" on the CFT website. See Complaint at 2-4. A press release on the CFT website dated October 27, 2004, states that CFT's WhereIsBaron.com released "hundreds of new 60 second radio ads throughout southern Indiana to help Hoosier voters learn more about the elusive Congressman's liberal voting record." See www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm. A press release dated October 29, 2004, on the CFT website refers to CFT "issue ads" that were being aired on "over a dozen" radio stations. See www.citizensfortruth.com/whereisbaron/PR-radio-intimidator.htm. The press releases included a link to listen to an ad called "Baron the Dodger" and the October 27, 2004, press release included a transcript of the ad. The transcript of the ad is as follows:

Why has Baron Hill dodged all but one debate? Maybe it's because he doesn't want you to know that he voted twice against protecting the American flag from people who want to burn it. Or could it be that Baron wants to keep it a secret that he voted to give preferential trade status to Communist China. Maybe Baron is worried that you'll find out that he voted against ending the burdensome death tax that devastates so many families after the death of a loved one. It might surprise you to learn that Baron voted against protecting traditional marriage from activist liberal judges. In fact, Baron voted no to military border patrols that would have protected us from drugs and terrorism. Did you know that Baron even voted against keeping God in the Pledge of Allegiance. No wonder Baron doesn't want

1 to debate the issues. He's afraid we'll find out how liberal he really is. To learn
2 more about Baron Hill's sneaky liberal agenda, visit WhereisBaron.com. Paid for
3 and approved by Citizens for Truth. Not affiliated with any candidate or political
4 party.
5

6 See www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm.

7 The "Baron the Dodger" radio ad is the only radio ad on the CFT website. The complaint
8 included no further information, and none was found on the CFT website, regarding other CFT
9 radio ads in 2004 or any radio ads in the 2006 election. In its response, CFT denies any spending
10 on radio ads in the 2006 election cycle. See CFT Response at 2-4. Thus, the only CFT
11 communication which can be analyzed under the coordinated communications test is the 2004
12 Baron the Dodger ad.

13 a. Payment Prong

14 As to the first prong of the coordination test, the complaint asserts that CFT paid for radio
15 ads and billboards and CFT acknowledges in its response that it spent "less than \$10,000" in the
16 2004 election cycle on both radio ads and a "small billboard buy." See Complaint at 2; CFT
17 Response at 2-4. As noted above, the Baron the Dodger ad is a CFT radio ad that was broadcast
18 in October 2004. Thus, it appears that CFT may have paid for a communication in 2004,
19 satisfying the first prong of the coordination test. See 11 C.F.R. § 109.21(a)(1).

20 b. Content Prong

21 At all times relevant to this matter, the second or "content" prong of the coordination test
22 was satisfied if the communications at issue met at least one of four content standards: (1) a
23 communication that was an electioneering communication as defined in 11 C.F.R. § 100.29; (2) a
24 public communication that republished, disseminated, or distributed candidate campaign
25 materials; (3) a public communication containing express advocacy; or (4) a public
26 communication, in relevant part, that referred to a clearly identified Federal candidate, publicly

1 distributed or disseminated 120 days or fewer before a primary or general election, and was
2 directed to voters in the jurisdiction of the clearly identified candidate. See 11 C.F.R.
3 § 109.21(c).² The “Baron the Dodger” radio ad satisfied the last of these standards.

4 The Baron the Dodger radio ad was a public communication, see 2 U.S.C. § 431(22),
5 referring to Baron Hill, a clearly identified federal candidate, see 2 U.S.C. § 431(18), publicly
6 distributed or disseminated in October 2004, which was 120 days or fewer before a general
7 election, and it was directed to voters in the jurisdiction of the clearly identified candidate.
8 Accordingly, the ad satisfies the content prong of the coordinated communications test. See 11
9 C.F.R. § 109.21(c).

² In response to the decision in *Shays v. F.E.C.*, 414 F.3d 76 (D.C. Cir. 2005) (“*Shays I*”), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. See Final Rules and Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The amended regulations, among other things, reduced the pre-election window during which certain communications that refer to a clearly identified House or Senate candidate are publicly distributed or otherwise publicly disseminated from 120 to 90 days. See 11 C.F.R. § 109.21(c)(4)(i) (2007). Subsequently, in *Shays III*, the U.S. District Court for the District of Columbia held that the Commission’s revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties’ motions for summary judgment). Subsequently, the D.C. Circuit affirmed the district court regarding the invalidity of the current standard for public communications made outside the timeframes specified in the standard. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

The activity at issue in this matter occurred before the July 10, 2006 effective date of the revisions to Section 109.21. Accordingly, all citations to the Commission’s regulations refer to them as they existed prior to that date. Notably, the revisions would not appear to change the result in this matter even if they were applied retroactively. CFT’s “Baron the Dodger” radio ad was broadcast in October 2004 which was within the shortened 90-day time frame in the revised regulations (based on the November 2, 2004 general election, the 90-day period would start on August 4 and the 120-day period would start on July 5).

c. Conduct Prong

The Commission's regulations set forth six types of conduct between the payor and the recipient committee, whether or not there is agreement or formal collaboration, that can satisfy the conduct prong. *See* 11 C.F.R. § 109.21(d). To meet the conduct prong of the coordination communication test, the communication must have been made at the request or suggestion of the Federal candidate, with some material involvement by the Federal candidate, as a result of substantial discussions with the Federal candidate, or through the use of a common vendor, employee or independent contractor that the Federal candidate also used within certain timeframes. 11 C.F.R. § 109.21(d).

The complaint asserts that there is "overwhelming" evidence of coordination between CFT and Sodrel. *See* Complaint at 4. In support of this contention the complaint offers only two suppositions: that CFT was formed only to attack Hill which, the complaint asserted, is "rare" or "unprecedented" for a 527 organization; and that Bernitt made 71 "contacts" with Sodrel or his associates in the 67 days leading up to the 2006 election. *See* Complaint at 4 and Attachment A.

The first contention does not satisfy the conduct standard in the Commission's coordination regulations. Even if CFT was formed only to attack Rep. Hill, this fact alone does not indicate that CFT was not acting independently but rather coordinating its attacks on Hill with FMS, and therefore that CFT's payments for its communications constituted excessive in-kind contributions to FMS.

The second contention is limited to alleged contacts shortly before the 2006 election, and, therefore, the available information does not suggest that the conduct standard may have been satisfied with respect to the broadcast of CFT's "Baron the Dodger" radio ad before the 2004 election.

Accordingly, as the available information does not indicate that the conduct standard of the coordinated communications may have been met, the Commission finds no reason to believe that Citizens for Truth made excessive in-kind contributions in violation of 2 U.S.C. § 441a.

B. CFT's Alleged Failure to Register with the Commission and Disclose Contributions and Expenditures Based Upon Coordinated Communications

The complaint alleges that if CFT coordinated communications with Sodrel, it would have made more than \$1,000 in expenditures and would have been required to register with the Commission pursuant to 2 U.S.C. § 433. The complaint also alleges that CFT failed to disclose the contributions and expenditures associated with the allegedly coordinated communications in violation of 2 U.S.C. § 434. *See* Complaint at 5. As indicated above, the available information does not indicate that there may have been coordination between CFT and Sodrel or FMS. Accordingly, the Commission finds no reason to believe that Citizens for Truth violated 2 U.S.C. § 433, and finds no reason to believe that Citizens for Truth violated 2 U.S.C. § 434 based on the allegedly coordinated communications.

C. CFT's Alleged Failure to File Independent Expenditure or Electioneering Communication Reports

Finally, the complaint alleges that CFT violated the Act by failing to file independent expenditure or electioneering communication reports with the Commission regarding its election activity in 2004 and 2006 because CFT's ads in 2004 and 2006 constitute express advocacy under the Act and should have been reported as independent expenditures or electioneering communications. *See* Complaint at 6. If CFT's payments for its election activity constituted "independent expenditures" within the meaning of the Act and were over \$250 in any given year, then CFT would have been required to file a statement containing certain disclosures with the Commission. *See* 2 U.S.C. 434(c)(1) and 11 C.F.R. § 109.10. *See* 60 Fed. Reg. 35292, 35295

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(July 6, 1995). Also, every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year must file a statement with the Commission containing certain information, including the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement. See 2 U.S.C. § 434(f). An electioneering communication includes broadcast communications that refers to a clearly identified candidate for federal office that is made within 60 days before a general election and which is targeted to the relevant electorate. See 2 U.S.C. § 434(f)(3). A communication is targeted to the relevant electorate if the communication can be received by 50,000 or more persons in the district the candidate seeks to represent, in the case of a candidate for Representative. See 2 U.S.C. § 434(l)(3)(C).

I. Independent Expenditures

In determining whether an organization makes an expenditure, the Commission “analyzes whether expenditures for any of an organization’s communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” 72 Fed. Reg. at 5606. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases, campaign slogans, or individual words “which in context can have no other reasonable meaning than to encourage the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say ‘Nixon’s the Onc,’ ‘Carter ’76,’ ‘Reagan/Bush’ or ‘Mondale!’” 11 C.F.R. § 100.22(a); see also *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (the fact that a message is “marginally less direct than ‘Vote for Smith’ does not change its essential nature”).

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1 Under the Commission's regulations, express advocacy may also consist of a
2 communication that contains an "electoral portion" that is "unmistakable, unambiguous, and
3 suggestive of only one meaning" and about which "reasonable minds could not differ as to
4 whether it encourages actions to elect or defeat" a candidate when taken as a whole with limited
5 reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). In its
6 discussion of then-newly promulgated section 100.22, the Commission stated that
7 "communications discussing or commenting on a candidate's character, qualifications or
8 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
9 they have no other reasonable meaning than to encourage actions to elect or defeat the candidate
10 in question."

11 The only identifiable communication in this matter is CFT's "Baron the Dodger" radio
12 ad, which appears to have been broadcast in October 2004. No other CFT communications from
13 2004 or 2006 were identified in the complaint or found on CFT's website. The costs of the ad
14 are unknown but CFT states that it spent "less than \$10,000" on its radio ads in 2004.
15 Regardless of whether the "Baron the Dodger" ad expressly advocated the defeat of Rep. Hill,
16 given the time that has elapsed since the alleged ad was broadcast and the modest potential
17 amount that Citizens for Truth spent on this ad, the Commission dismisses the allegations that
18 Citizens for Truth failed to report payments for the ad as independent expenditures in violation
19 of 2 U.S.C. 434(c) as a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821,
20 831 (1985).

1 2. *Electioneering Communications*

2 As noted above, the complaint did not include any descriptions of CFT communications
3 and the "Baron the Dodger" radio ad, which appears to have been broadcast in October 2004, is
4 the only CFT communication we have identified from the CFT website. This radio ad is a
5 broadcast communication that refers to a clearly identified candidate for federal office and was
6 publicly distributed in October 2004, that is, within 60 days before a general election for the
7 office sought by the candidate. *See* 2 U.S.C. § 434(f)(3). However, it is unclear whether it was
8 "targeted to the relevant electorate," that is, whether it could have been received by 50,000
9 people in the relevant Congressional district. *See* 2 U.S.C. § 434(f)(3)(C). Moreover, CFT
10 asserts that it spent less than \$10,000 on radio ads in 2004. *See* CFT Response at 2. Because there
11 is no information suggesting that CFT spent more than \$10,000 on electioneering
12 communications in 2004, the Commission finds no reason to believe that Citizens for Truth
13 failed to file an electioneering communications report in violation of 2 U.S.C. § 434(f).

14 V. CONCLUSION

15 The Commission finds no reason to believe that Citizens for Truth made excessive in-
16 kind contributions in violation of 2 U.S.C. § 441a, finds no reason to believe that Citizens for
17 Truth failed to report the allegedly coordinated communications as contributions in violation of 2
18 U.S.C. § 434, finds no reason to believe that Citizens for Truth violated 2 U.S.C. § 433,
19 dismisses the allegations that Citizens for Truth failed to report payments for the ad as
20 independent expenditures in violation of 2 U.S.C. 434(c) as a matter of prosecutorial discretion,
21 *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and finds no reason to believe the allegation
22 that Citizens for Truth failed to file an electioneering communications report in violation of 2
23 U.S.C. § 434(f).